



Where the Streets Have No Name: Immigrants, National Identities, and the Consequences of a Narrow Universalism



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Introduction

The Italian Minister of International Cooperation and Integration, Professor Andrea Riccardi, recently declared that Italian legislation on immigration should address the problem of citizenship for immigrants in a new and positive ways. According to his thinking, Italy should go beyond the two alternative paradigms of *ius sanguinis* – which accords the citizenship only to those who are of Italian descent – or *ius soli* – which accords the citizenship only to those who were born in Italy. We should instead reach a broader, more refined and realistic conception of the right to citizenship as a sort of *ius culturae*.² Min. Riccardi suggests that we are Italian because we share our life, culture, lifestyle and values with the people of our country. So immigrants should be accorded citizenship with the same logic: they should become Italian – or be considered as Italian – since they share their lifestyle, values and culture with Italians.

Mr. Riccardi's statement has been almost immediately forgotten. After all, he is a member of a openly interim government, which has very different priorities, focusing on the financial crisis. Moreover, the dichotomy between *ius sanguinis* and *ius soli* is more nuanced than how it is usually depicted: immigrants already can become Italian, after quite a long period of legal residency in Italy (usually 10 years).³ Finally, it is not so clear how the *ius culturae* criteria could be applied: how could one measure the level of cultural integration of an immigrant?

Notwithstanding all these problematic aspects of the idea of a *ius culturae*, it must be recognized that Mr. Riccardi has pointed the finger to a longstanding issue about immigration, integration and citizenship – an issue that has several counterparts in other European states, too.

In fact, vast parts of Europe are struggling with the question of *what transforms an immigrant into a*

1 Lecture in Public Comparative Law, University of Padua. Visiting Scholar at Notre Dame University, Center for Civil and Human Rights, and Senior Fellow at Emory University, Center for the Study of Law and Religion. I am immensely grateful to Paolo Carozza for his invitation to participate in the activities of his Center, even if only briefly. I am deeply grateful also to Marta Cartabia, Andrea Simoncini, Erik Longo, Donald Kommers, for their comments at the Faculty colloquium that originated the paper. I am especially thankful to Christine Cervenak, whose support, encouragement, comments and help were so important. This work is in loving memory of Alessandra Pastorino Epidendio: her earthly life was helpful for many of us, up to its very end. I welcome comments: please address them to andrea.pin@unipd.it.

2 <http://www.andrearriccardi.it/it/rassegna-stampa/cittadinanza-riccardi-ius-culturae-e-la-chiave->.

3 Law no. 91, February 5th, 1992, Article No. 9

citizen – or into a welcome long-term immigrant. A quick reminder of the initiatives and declarations that were taken by some European countries in a quite short period of time will help. Germany recently affirmed that multiculturalism is over as the German model of integrating immigrants;⁴ this happened just a few years after Germany had introduced a breakthrough legislation, cancelling the traditional German approach to citizenship, which basically focused on *ius sanguinis*.⁵ Prime Minister John Cameron analogously declared the end of multiculturalism in Great Britain,⁶ shortly after Gordon Brown’s idea of enshrining the main features of UK’s culture in a list of British Values.⁷ French legislation on the Muslim veil’s ban – in classrooms and in the public space – sprang out of the same impression that immigrants should align themselves with French republican values.⁸ France also reformed its citizenship legislation requesting that immigrants assimilate into French republican values and familiarize themselves with rights and duties that French citizens enjoy, in order to acquire citizenship.⁹ Spain is repealing the quite recent legislation on *Education to Citizenship*, which was intended to provide, among other things, a framework of values upon which all the citizens of Spain should agree and to which they should be educated.¹⁰ Italy has been tackling the issue of what constitutes a citizen with similar tools. It is worth mentioning here the Italian *Charter of Values, Citizenship and Integration*,¹¹ which was conceived as a document to be handed to immigrant workers along with their work and residency permits, as soon as they entered the country’s borders and showed up at the governmental offices. Finally, even the European Commission delivered a Communication in which it fostered an immigrants’ integration process that would require “immigrants [to] respect the fundamental norms and values of the host society.”¹²

This short list of examples shows that several European countries, and the European Union as well, are reflecting and legislating on the values that citizens, immigrants and prospective citizens should share.¹³ The states have different approaches, of course: some focus on non-citizens (such as Italy),

4 <http://www.bbc.co.uk/news/world-europe-11559451> (visited June 20th, 2012).

5 Iseult Honohan, *The Theory and Politics of Ius Soli*, European University Institute of Florence, June 2010, 13, at <http://eudo-citizenship.eu/docs/IusSoli.pdf> (visited June 20th, 2012).

6 This happened in his address in Munich, February 5th, 2011, at <http://www.newstatesman.com/blogs/the-staggers/2011/02/terrorism-islam-ideology> (visited June 20th, 2012).

7 <http://www.parliament.uk/documents/commons/lib/research/briefings/snpc-04559.pdf>.

8 <http://www.assemblee-nationale.fr/13/pdf/rap-info/i2262.pdf> (visited June 20th, 2012), esp. 85.

9 Decree No. 61, April 25th 2007.

10 Ley Orgánica n. 2, May 3rd, 2006.

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http://www.interno.it/mininterno/export/sites/default/it/assets/files/14/0919_charter_of_values_of_citizenship_and_integration.pdf (visited June 20th, 2012).

12 Communication on *Immigration, Integration and Occupation*, June 2003, COM(2003), 336, par. 3.1.

13 Llav Orgad, *Illiberal Liberalism. Cultural Restrictions on Migration and Access to Citizenship in Europe*, 58 *The American Journal of Comparative Law* 2010, 58.

others focus on the criteria that should inform citizenship rights policies (such as Germany);¹⁴ and others consider the tools that are needed to erase cultural conflicts among social groups, regardless of their citizenship status (Spain, for instance). Some countries highlight the roots – and therefore the past – that their citizens share, in order to provide noncitizens with a clear idea of the mindset that they are expected to embrace (Italy or Germany);¹⁵ others envisage a new compact or mindset for everyone, and therefore focus on the future (Spain). These details make a lot of difference. They demonstrate that there is a distinction between the countries that focus on the past, which is usually reflected in the *ius sanguinis* criteria, and the countries that are most concerned with the future – typically, the *ius soli* perspective. The former assumes that children of native-born citizens are good citizens and that their values must be instilled in newcomers: this is why the past of a country matters so much. The latter believe that immigration, among other factors, forces domestic institutions to frame a new compact for everybody: this is why such strand of thinking is most concerned with giving a common future for all the people, regardless of their origins.

Beyond all these differences, it is possible to single out some common features of the policies of immigration, citizenship and lifestyle that several European countries are considering. In all the aforementioned cases, the problems of immigration and of citizenship standards bring about the problem of defining the “identity” of a nation.

In fact, whether we believe that *newcomers* need to know the hosting country’s values, or that *everybody* should agree on some basic common values, however we must address the following problem: *which are the values that characterize a given country?*

This quest for state’s identity affects both immigration and citizenship policies. This is also because the concepts and the status of citizens and of immigrants tend to overlap. The right to citizenship is losing its importance in several European states because it is being gradually deprived of substantial effects. The mere residency in a state’s territories is becoming the key-factor that endows immigrants with substantial portions of rights that used to be reserved to citizens. The status of citizens and the status of immigrants tend to merge into one and therefore the problematic definition of the identity of a state touches upon the integration of immigrants as dramatically as it does with regard to the integration of new citizens.¹⁶

The purpose of this paper is precisely to highlight the difficulties in framing the debate about national identity and values. After a few remarks about the means through which several countries tend to shape their immigration policies (paragraph 1), I will try to explain how such difficulties

14 See Orgad, 100.

15 See Orgad, 66.

16 Laura Montanari, *La cittadinanza in Europa: alcune riflessioni sugli sviluppi più recenti*, in www.associazionedeicostituzionalisti.it (last visit: July 27th, 2012).

derive: from the overwhelming universalistic approach of contemporary constitutionalism (paragraph 2); from a certain understanding of the nature and of the role of national identity as opposed to universalism (paragraph 3); from the commonly universalistic approach that the main contemporary legal traditions share (paragraph 4); and from an underestimation of national identity (paragraph 5). In the Conclusion, I will (a) discuss the belief that national identity can be enforced through policies of identity without losing its distinct features and (b) propose a different reading of national traditions.

1. Immigrants, human rights and culture

The first common feature of all the attempts to address such issues comes from their rationale: making noncitizens good citizens – in other words, people with whom citizens can peacefully and fruitfully coexist. This rationale can be found also in legal systems that foster a change in the citizens' mindset: this change is needed precisely – or mainly – because of the arrival of strangers with different cultural backgrounds.

Generally, it is believed that noncitizens who come to European countries need to meet certain standards, in order to settle and, prospectively, get citizenship. Sometimes they are – more or less closely – evaluated, sometimes they aren't. For instance, immigrants who apply for permanent residency permit in France now have to prove a sufficient knowledge of the French language.¹⁷ Or, in Switzerland, until recently some Cantons' Parliaments – which still have the power to concede or to deny citizenship – could accord citizenship basically deciding on a case-by-case basis.¹⁸

Obviously, also here one can find several differences. In some countries, the integration policies focus on the immigrants' capabilities to interact with others or to understand the country's lifestyle they are joining, such as language skills. In other countries, the evaluations are less punctual and cover a broader spectrum of skills, personal commitments and cultural background of those applying for citizenship.¹⁹

The diverse national perspectives converge, however, in a second aspect: namely, they tend to depict newcomers – at least – as partially different from the people who have been living in the host countries for generations. They assume that there is a gap between the new or prospective citizens on one hand, and the citizens whose roots are well embedded in the national culture and lifestyle, on the other hand.

¹⁷ See Orgad, 66.

¹⁸ See the Swiss Federal Tribunal's decision released February 9th, 2003: DTF 129/217 ff.; 129/232 ff.

¹⁹ See Orgad, *Passim*.

There are different – and oftentimes good – reasons for believing that newcomers are culturally different from those who have a long history of citizenry and residency in a country. After all, many of these policies derive from the open failure of multiculturalism or of cultural pluralism,²⁰ as we recently witnessed with the huge riots in France, UK and Sweden, which had strong racial, cultural and religious characterizations.

Multiculturalism and pluralism conceded that different peoples have different cultural backgrounds, but they maintained that the social and political balance between the different cultures would spontaneously result from their meeting (the pluralistic approach) or that there was no need of balancing different cultural standpoints or even making them meet (the multicultural approach).²¹ The contemporary models of immigrants' integration share the view that that gap must be filled, at least partially, by the institutions and the law.

It is interesting to notice that the different countries' attempts to address the cultural gap between newcomers and citizens overlap on a third point: the universal rights they put at the center of their integration and citizenship programs. This is the aspect I am investigating more deeply now.

2. Contemporary constitutionalism and neutral patriotism

The Spanish *Education to Citizenship's* principles, the Italian *Charter of Values, Citizenship and Integration* – which each take very different perspectives – and the rationales behind the recent Muslim veil's bans in France, all focus largely on the same values: human dignity, equality, and democracy, among others. These values are depicted in a quite general fashion and frequently reflect the fears from the Muslim presence, which is supposed to pose problems to gender equality, democracy and dignity.

Although they are consistently opposed to incomers' and newcomers' collective identities, such values don't clearly reflect the hosting country's identity. There is certainly some difference between the way France conceives state neutrality, or equality, and the way these values are conceived in, say, Italy; but both countries tend not to focus on the differences. They tend to highlight the values, rather than the specific ways these values are enforced and embedded in their cultures. They take similar vantage points: the way they enforce rights is simply the way rights should be universally enforced, according to what states affirm.²² They tend not to draw relevant

²⁰ See Orgad, 59.

²¹ See, among many, Pierpaolo Donati, *Beyond Multiculturalism: Recognition through the Relational Reason*, 2 *Polish Sociological Review* 166, 2009, 147 ff.

²² Ronald Dworkin, *Justice for Hedgehogs*, Belknap Press of Harvard, Cambridge (Mass.), London 2011, 338, explores the rationales behind the universalization of human rights' protection.

distinctions from other countries depending on which human rights they enforce and on how they enforce them.

This is – at least partially – true also with reference to states that tend to enforce a clearer “identitarian approach,” which stresses the role of history and the common heritage of a nation (say France, or Italy). This approach aims at assimilating newcomers into the national culture. But its focus on national identity is still mostly concerned with the illiberal and anti-humanitarian practices of immigrants – practices that are believed to degrade human dignity and therefore to be contrary to basic human rights, rather than to a given national culture. Although such states stress their “identitarian approach,” they are actually focusing on fundamental human rights that they feel to be intensely linked with their collective history.

Therefore, states produce texts, documents and reflections that are intended to provide immigrants with a standardized imagery and lifestyle, which can differ in details, but is the same in its core values. What many European states produce is a list of basic rights that are common throughout civilized societies. In so doing, the countries that stress the centrality of some basic rights miss the target of their policies: they don’t provide immigrants with a clear picture of themselves, but rather give them the basics of human rights, while they confine their specific features to a secondary role.

This is actually the failure of the project of making immigrants and new citizens committed as much as possible to the life of the country that hosts them. There is no reason to believe they will feel attached to a specific country, since this country is described in very general terms, as enforcing basic rights that the country believes should be enforced everywhere. If a country’s values are identified with very general values, which are shared by a large number of other countries and have a universal aspiration, then the kind of attachment a country is promoting actually refers to a general – and hopefully even universal – list of human rights.²³

This is a kind of failure that can be found also in the “constitutional patriotism”²⁴ ideology,²⁵ which would have citizens committed and emotionally attached to their national constitutions: in this respect, the constitutional patriotism ideology is similar to the new wave of identitarian policies because it suffers from an excessive generalization of the aspects that characterize national constitutions. If a list of rights is the main purpose of any national constitution as well as the main concern in the education of immigrants and even of citizens, and if such rights are highlighted as common to a large number of countries, then one should feel attached to that list of rights, rather than to a specific country.

23 Seyla Benhabib, *Another Cosmopolitanism* (ed. Robert Post), Oxford University Press, New York 2006, 32.

24 Among many, see Jan-Werner Müller, Kim-Lane Scheppelle, *Constitutional Patriotism: An Introduction*, 6 *International Journal of Constitutional Law* 2008, 67.

25 See, recently, F. D’Agostino, *Jus quia justum*, Giappichelli, Torino, 2012, 26-27.

Admittedly, the more a human right is universal, the more understandable it is to expect immigrants to respect it. Nevertheless, the more a right is universal, and praised for being universal, the harder it becomes for immigrants to feel attached to the country they are living in.²⁶

3. Enforcing universal human rights on a local level

As we saw, the universality of rights is not good enough to strengthen the relationship between citizens, immigrants and national institutions. Sometimes it can even widen the gap between the people and the national institutions diverge, since the people are expected to grasp more universal and abstract values than the practices of their own country. A good citizen turns to be a citizen who cares more of human rights than the nation he is living in.

This phenomenon is indebted with the practice of expressing the values of a country with the language of rights. Rights are believed to be the pillars upon which a society is built, and this prompts the universalistic tendency of states' identitarian policies.

The longstanding tradition of rights culture has made it difficult to express national cultures without using human rights language and, more precisely, with a *universal human rights* one. Of course, there are aspects of any country that can be described in non-human rights terms: one can say that Italians love soccer and food; French people are proud of their history and of their old cities; Spaniards love Flamenco music and keep the practice of killing bulls for fun; Britons are commonly portrayed as preserving an aristocratic lifestyle, such as the fox hunting sport. But it is not by chance that one does not expect immigrants and citizens to share these quite common practices and ideals. One can expect Italians to be very selective in the way they choose restaurants; one can hardly impose this practice on new Italians or on prospective Italians.

After all, it seems that rights can be enforced, but that they are detached from a country; on the contrary, culture is believed to be geographically and socially situated, but it is hardly enforced.

The common recourse to human or universal rights shows another interesting aspect of the understanding of a state's dignity. In relying on human rights so heavily, European countries believe that what they care most about is what they would spread throughout the world: that such rights are so fundamental in themselves, regardless of the country that forged or introduced them, that all countries should protect and enforce them. The esteem that is accorded human rights makes their value so high that they are believed to be universally valid.

²⁶ Umberto Vincenti, *Diritto senza identità*, Laterza, Roma-Bari, 2008.

Of course this doesn't help to define the identity of a country. It confirms that the same human rights' ideology that characterizes contemporary European states blurs the states' identities, precisely in the name of the ideals they are committed to. The more a state is committed to human rights, the more its aspiration is universal and the less defined needs to be its identity.

The idea that the dignity of a political community is effectively expressed through a catalogue of rights, and that these rights are intrinsically universal, has been successfully replicated through the federalizing process in several states.

In fact, this attention to human rights is also a common feature of the most recent trends in federalism and decentralization processes. It can be found in the United States, too, even if this country is characterized by a federalist structure that dates back to the end of the Eighteenth century. Notoriously, one of the contemporary readings of American federalism parallels states and Federation in promoting human rights: according to this reading, the states have a dignity because they can compete with the federation in broadening the list of rights that are enforced, and because they can push the federation to enforce such rights.²⁷ If this reading is correct – and I will not investigate its correctness here – states are endowed with a specific dignity *because* they promote rights that can become universal. After all, even American states are believed to enforce universal rights.

A similar attitude can be found in a strand of the recent Italian federalizing process, as I will show in the following paragraph.

3.1. The human rights' standard model: an Italian example

During the recent Italian federalizing process, which was initiated by two constitutional reforms in 1999²⁸ and 2001,²⁹ the regions enjoyed an increase in their powers as well as in their political importance. Even if they weren't accorded any sort of state sovereignty, they have come to represent collective identities in broader terms.

After the two constitutional reforms, the regions underwent some relevant internal reforms. The most symbolical one was the reform of their fundamental statutes. Many of them were completely rewritten, in order to align their provisions with the new outstanding role of the regions.

Several regions decided to express their identity through quite long lists of rights and values. These values should represent the pillars through which a peaceful, shared life is built between peoples of different cultures, faiths and origins who came to live in the same region. In fact, although the

27 Among many, see Robert A. Schapiro, *Poliphonic Federalism. Toward the Protection of Fundamental Rights*, The University of Chicago Press, Chicago-London, 2009, *passim*.

28 Constitutional law no. 1, November 22nd, 1999.

29 Constitutional law no. 3, October 18th, 2001.

regions have no role in according or denying citizenship or residency permits, they are believed to represent important leverage points for the construction of a shared political community, following a *bottom-up* logic.

The values and rights that are included in the regional statutes should characterize the regional collective identities: they should reflect the sensibility and the character of the people who live in the regions, and represent the framework for the integration of newcomers. After all, if the statutes were all equal, they would simply repeat a standardized national identity – and therefore, there would be no reason to replicate the constitutional provisions.

Interestingly, the statutes that have been delivered express their commitment to universal rights and their intentions to align their policies to the contemporary trends of human rights discourse extensively.³⁰ In short, they use a globalized language to express a globalized commitment: the respect of human rights. They obviously diverge in the way they express their commitment, and in the number of rights they enlist. But they all find their legitimization in the protection and enforcement of human rights on a global basis.

The universal human rights discourse has been spreading throughout the different levels of government, regardless of the powers each level is endowed with. We can therefore investigate the reasons for such a frequent interest in human rights.

4. Why the states focus on human rights: competing universalisms

The spread of human rights is well embedded in the belief that human rights should be universally enforced, since they are universally valid. It is not necessary to delve into this aspect; it will suffice to recall that the debate around human rights has been dominated by the preoccupation that human rights are universally enforced.³¹

A huge debate has characterized the discourse around human rights and universalism, since different legal traditions have competing conceptions of human rights and their universal claim is an inherent part of such competition.³² Some of the most relevant legal traditions – such as the modern and contemporary pattern, which has the European Court of Human Rights among its

30 Elisabetta Catelani, Enzo Cheli (eds.), *I principi negli statuti regionali*, il Mulino, Bologna 2007; Antonio d'Atena, *I nuovi statuti regionali ed i loro contenuti programmatici*, at <http://www.issirfa.cnr.it/3991,908.html> (visited June 20th, 2012).

31 Michael Perry, *The Political Morality of Liberal Democracy*, Cambridge University Press, New York, 2010, 61.

32 Christopher McCrudden, *Legal and Roman Catholic Conceptions of Human Rights*, 1 *Oxford Journal of Law and Religion* 2012, 199.

leading actors in the Continent; the Catholic doctrine of human rights; the Natural Law theory;³³ the Islamic theories of human rights,³⁴ which is not traditionally familiar with European constitutionalism but is relevant for European doctrine, as one of its major theoretical and social competitors – have been dominated by this universalistic preoccupation. And we already saw that the constitutional patriotism ideology has a universalistic approach to the reasons that would ground the attachment of a people to their national constitution.

The aspects of the legal traditions that aren't supposed to characterize all of mankind are usually left in the penumbra, unless they are disregarded as suspicious concepts, carrying a neo-nationalistic concept of statehood, which would be quite close to the ideologies that tragically characterized Europe mostly in the first half of the twentieth century.³⁵ It will suffice to highlight this aspect in some of the main European doctrines that have dealt with human rights.

The utilization of modern Natural Law theory usually confines the territorial specificities to the field of *determinatio*, which is left to local political communities and is not *relevant* to the theory itself.³⁶

The influential European Court of Human Rights distinguishes between the human rights standard and the margin of appreciation, which is left to the member states and is not *relevant* for the violation of human rights.³⁷ The reasoning of the European Court draws a distinction between what is a human right and what is irrelevant: and the state's identity falls within the second category.³⁸

An exception in this irrelevancy exists: states can overlap in what rights they freely decide to enforce. This creates a consensus that is used by the Court to expand the list of human rights to include the new rights on which the states agree. But this proves that states' human rights models matter only *if and when* they overlap, i.e. when they aren't specific of only one country and don't qualify a specific state's identity. In other words, states' identities can become relevant when they converge and therefore cross the national boundaries.

33 John Finnis, *Natural Law and Natural Rights*, Oxford University Press, Oxford 2011, 80 and 84; Steve Covell, *The Defence of Natural Law*, St. Martin's Press, New York 1992, 241.

34 It is possible to mention here the two most famous Islamic declarations on human rights, which are both characterized by a strongly universalistic approach: the Declaration of Human Rights in Islam (Cairo, 1990), and the Universal Islamic Declaration of Human Rights (Paris, 1981). See extensively Sami Aldeeb Abu Sahlieh, *Les musulmans face aux droits de l'homme*, Bochum 1994.

35 Dieter Grimm, *Integration by Constitution*, 3 *International Journal of Constitutional Law* 2005, 202.

36 See Finnis, 284, 285 and 289.

37 The doctrine of the margin of appreciation in the context of the European Court of Human Rights is immense. See, famously, Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Kluwer, The Hague 1996.

38 But see Marta Cartabia, *Lecture at the University of Padua School of Law*, June 11th, 2012, according to whom the margin of appreciation is needed because, while national courts and parliaments focus on balancing competing rights, the European Court focuses on single violations of an enumerated list of rights. Therefore, the margin of appreciation gives the states enough room to shape their distinct balance of rights. Without the margin of appreciation, the European Court would jeopardize the possibility for the states to strike rights' balance. If this reading is correct, the margin of appreciation is a necessary mean for the preservation of two different conceptions of judiciary: the one that accommodates competing interests, and the one that focuses on the violation of single rights.

Some authoritative theorizations of customs think globally, too: it is possible to recall the debate between Seyla Benhabib and Jeremy Waldron about the role of custom and their attitude to be globalized.³⁹

The Catholic theory of human rights, common good⁴⁰ and subsidiarity, which calls on larger political bodies to act after that smaller ones have proved to be unable to solve problems, logically assumes that *all* the political bodies – from the local ones to the global ones – are concerned with the *same* public interests and with the respect of the same rights.

In all of the aforementioned traditions, the focus is not on the specificities of each political body, but rather on the sameness of rights that should be enforced. It is therefore completely understandable that the states tend to legitimize themselves through the adoption and the enforcement of universal rights: the major legal traditions, through which they are commonly politically, legally and culturally measured, focus on them.⁴¹

All of these legal traditions acknowledge that human rights retain a moral meaning,⁴² and therefore express the value of a state. This aspect illuminates why, on the overall, human rights are used to rank the states: a state's degree of human rights' enforcement mirrors the state's dignity. Ranking a state's human rights protection is ranking a state's dignity.

The importance of conceiving human rights as universal has also a second explanation: in stressing their commitment to universal rights, the states tend to ground their value on an objective basis: the fact that human rights are, or should be, universally respected and enforced, roots the state's legitimization and identity on solid grounds – grounds that are universally recognized.⁴³ The commitment to human rights endows the state with a presumptively absolute meaning and value, which a state could never achieve if it focused on merely domestic values.

But the very fact that states measure themselves with the protection of universal human rights leaves us with two unsolved problems.

5. Legitimization and identity

39 Benhabib, Jeremy Waldron, *Another Cosmopolitanism*, 32, 95 and 169.

40 Paolo G. Carozza and Daniel Philpott, *The Catholic Church, Human Rights, and Democracy*, 15:3 *Logos* 2012, 18.

41 Vincent D. Rougeau, *Catholic Social Teaching and Global Migration: Bridging the Paradox of Universal Human Rights and Territorial Self-Determination*, 32 *Seattle University Law Review* 2008-2009, 358.

42 Dworkin, 405; Perry, 1; Paolo G. Carozza, *My Friend is a Stranger: The Death Penalty and the Global Ius Commune of Human Rights*, 81 *Texas Law Review*, 2003, 1082, interestingly underlines the similitude between the contemporary universalistic approach and the natural law approach.

43 See Dworkin, 8 on the necessity of grounding public morality on objective truth.

In addressing the topic of national identity, the first problem we are left with is that states and local bodies, such as regions, do not seem to simply legitimize themselves through the universal human rights discourse; they rather identify their own value with it. Obviously, there are differences between the French, the Italian or the Spanish conceptions of human rights; but they all claim that they enforce the human rights that need to be respected; and that how they enforce them is exactly the proper way to do it. This can be said as a logical consequence of conceiving the rights being enforced as universal.

Even if the differences among the states do exist, the states don't declare that such differences are distinctive features of their own identities. In fact, even if they diverge sometimes in how they enforce rights, their affirmations about the way they enforce rights are as universalistic as the purposes that they have. A state is unlikely to distinguish itself from another state on the basis of which human rights it enforces, or how it enforces them. A state will rather deny a right the qualification as human right, rather than maintaining that it exists but doesn't deserve any constitutional protection.

Therefore, states can be distinguished one from another by the level of human rights protection they accord to their population – but this can be done only from the *outside*, not from the *inside*. An observer can draw distinctions based on which rights are enforced by each state and by which means. But we cannot expect that states rank their own commitment to human rights as an aspect of their identity: all the states will rank themselves #1 – at least in their auspices and hopes of enforcing human rights.

We are therefore left with the first delusive conclusion: a state's core identity is supposed to coincide with the rights that the states enforces – but the rights are supposed to be largely the same throughout the world, as we saw before.

This is true also with regard to the broader European perspective. The insistence on universal human rights is not a mere insistence on the human rights framework that would characterize the European Union's or the European Convention's member states. European countries don't take a European approach, believing that immigrants and new citizens should embrace the European understanding of human rights. On the contrary, Europeans think globally. European regimes and European legal doctrines share a universal vocation: they believe that the rights they endorse, protect and enforce should be endorsed, protected and enforced throughout the world⁴⁴. It is not by chance that the European Court of Human Rights (ECtHR) oftentimes compares state members'

44 For instance, the international and globalized level is well embedded in the German Basic Law. See Andreas Voßkuhle, *Multilevel Cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 179: "The drafters of the Basic Law not only strove for integration into a peaceful supranational order but also for an international cooperation going beyond such integration".

laws with the law of non-European states. Recently, in one single decision, for instance, the Grand Chamber compared English provisions with relevant laws of Australia, New Zealand, South Africa, Canada, Hong Kong, and USA.⁴⁵ The fact that the ECtHR looks outside Europe to integrate its readings of the European Convention demonstrates its Universalist approach.

The ECtHR's understanding of human rights as being universal is paralleled by state courts, which don't confine the comparative work to other European states, but look at least in North America and, specially, in the United States and in Canada.⁴⁶ For instance, some scholars speak about an emerging model of Commonwealth constitutionalism,⁴⁷ which includes common law regimes and in which the UK has an active as well as a passive role, since it draws inspiration from common law regimes of other continents.

Finally, the European legal doctrine has highlighted the deep convergence of civilized states of the world, in which the protection of human rights is expected to be particularly high, and defined this convergence as one of the most adequate tools that should help judges in interpreting their own domestic constitutional texts.⁴⁸ To put it shortly, it seems clear that a vast and authoritative portion of European doctrine thinks globally, not continentally.⁴⁹

5.1. The religion of human rights

The second major shortcoming in this conception of state's identity as expressed by human rights on a universal basis derives from the relationship between human rights and national traditions. Admittedly, national religious and cultural traditions have recently come to play a new role in shaping the contemporary identity of the states: they have been considered in their connections with modern human rights, rather than as opposed to them. They have been said to be the crucible out of which contemporary human rights were born, and therefore they have been restored in their historical dignity, at least partially.⁵⁰

The prominent German law scholar Ernst-Wolfgang Böckenförde put it in famous terms: "The liberal secular state lives on premises that it is not able to guarantee by itself. On one hand it can

45 E.g. par. *Al Khawaja and Tahery v. The United Kingdom*, app. nos. 26766/05 and 22228/06, decided December 15th, 2011, by the Grand Chamber: see par. 72.

46 As for UK, for instance, see Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 *Oxford Journal of Legal Studies* 4, 2000, 499.

47 See Francesco Duranti, *Il nuovo modello di giustizia costituzionale negli ordinamenti di matrice anglosassone*, paper presented at the biennial colloquium of the Italian Association of Comparative Law, Aosta, June 28th-29th, 2012.

48 Gustavo Zagrebelsky, *La legge e la sua giustizia*, il Mulino, Bologna, 2008, 397.

49 See Sabino Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale*, Donzelli, Roma, 2009, 5; Basil Markesinis, Jörg Fedtke, *Giudici e diritto straniero*, il Mulino, Bologna, 2009, 419.

50 See, authoritatively, Harold Berman, *Law and Revolution. The Formation of the Western Legal Tradition and The Impact of the Protestant Reformations on the Western Legal Traditions*, Harvard University Press, Cambridge (Mass.), London, 1983 and 2003; John Witte Jr., *The Reformation of Human Rights. Law, Religion and Human Rights in Early Modern Calvinism*, Cambridge University Press, Cambridge 2007; Brian Tierney, *Religion, Law and the Growth of Constitutional Thought*, Cambridge University Press, Cambridge 1982.

subsist only if the freedom it consents to its citizens is regulated from within, inside the moral substance of individuals and of a homogeneous society. On the other hand, it is not able to guarantee these forces of inner regulation by itself without renouncing its liberalism.”⁵¹ Similarly, Robert M. Carver, notoriously drawing a distinction between *nomos* and *narrative* in political societies, maintained that the universalistic human rights approach is a “weak” infrastructure, which comes after and cannot really supplant “worlds of strong normative meaning;” such worlds of strong normative meaning would be able to build up new law and political system thanks to their religious inspiration and structure.⁵² According to scholars such as Carver, then, religious traditions frame political societies, whereas legal systems enforce them.

Both Böckenförde and Carver have acknowledged that states rely on their religious and cultural traditions as sources of public morality and stimulus for the commitment to human rights. Böckenförde’s affirmation, though, has recently been converted into a powerful reason to publicly endorse, protect or enhance national traditions.⁵³ Italy famously endorsed Christianity as an inherent and decisive part of its moral background in the aforementioned *Charter of Values, Citizenship and Integration*.

Also in this context, we can see that religious and cultural traditions are considered as meaningful tools to enhance human rights.⁵⁴ They are put at the core of the public life, but in the name of human rights: we should cultivate our traditions and religions – the reasoning goes – because this helps cultivating human rights. The focus is still on human rights, rather than on the sources of a national human rights’ culture.

It is not by chance, then, that the reconsideration of national traditions has been paralleled by a relevant gradualist theory of constitutionalism, according to which traditions matter as historical human rights’ diving-boards. Traditions are relevant for their outcome, rather than in themselves.⁵⁵ They matter because they can make good citizens: because they are useful in “making men legal,” through “making [them] moral.”⁵⁶ Therefore, they may well disappear, since it is their outcome – the human rights – what really matters. What immigrants should embrace are still universal human rights, whereas they need only to recognize the historical value of national cultures.

Returning to the examination of the quest of a state’s identity as a device to integrate newcomers, this portrait of tradition does not really define the core of a country. It can be used retrospectively,

51 Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit*, Frankfurt 1976, 60.

52 Robert M. Carver, *Foreword: Nomos and Narrative*, 97:4 *Harvard Law Review* 1983-1984, 12.

53 Rousseau, 344.

54 Marcello Pera, *Why We Should Call Ourselves Christian: The Religious Roots of Free Societies*, Encounter Book, New York 2011, suggests this approach to christianity and contemporary liberalism.

55 Cass Sunstein, *Why Societies Need Dissent*, Harvard University Press, Cambridge (Mass.), 2003.

56 Robert P. George, *Making Men Moral: Civil Liberties and Public Morality*, Clarendon Press, Oxford 1995.

in order to portray the long way that a country has come, but it isn't necessary to describe its fundamental values, which consist of human rights.

After all, if traditions are used in this way, they are treated as mere human rights' roots and therefore underestimated in their value and, at the same time, they don't really capture a state's identity, which is to be found primarily in human rights.

Conclusion (and Introduction for a new research topic)

We have seen that several European states find it difficult to describe their own identity without identifying themselves with human rights standards, which are global in their inspiration. The more the states stress the importance of human rights, the less important they become.

What states propose and eventually request from immigrants differ from state to state, but the final goal is usually the same: that they join the universal commitment to human rights. The same attachment of immigrants to the state they join should be justified with the state's commitment to the enforcement and implementation of human rights.

As we saw, stressing human rights' relevance has a reason. In fact, this finds its rationale in the moral substance of human rights. Nevertheless, this makes the state's identity anonymous: the history and the specific features of a State aren't relevant; or, they are relevant only insofar as they have historically and culturally led to the shaping of human rights.

If the identity of a state is expressed with the language of hopefully universally protected human rights, the only distinction that can be made among the states depends on the list of human rights they respect and on the way they protect them. But this comparison can be made from the outside, rather from the inside. States do not affirm that they are enforcing less human rights than others; they will be more inclined to disregard the rights they don't enforce as not being human rights.⁵⁷

The laws and the manifestos that have been introduced in order to depict the identity of the states have sometimes ignored, and sometimes included the religious and cultural traditions of the states in their discourse. Nevertheless, both the perspectives have largely considered their traditions in the light of the human rights they have contributed to shape. Traditions have been considered as human rights' historical antecedents and engines. This inclines to the conclusion that it is possible to single out human rights from their crucible.

⁵⁷ Similarly, Alasdair MacIntyre mentions the criticism according to which traditions can be evaluated from the inside, not from the outside, since the standard that can be used to measure them loses any value outside the traditions themselves. See *Whose Justice? Which Rationality?*, University of Notre Dame Press, Notre Dame 1988, 169.

The conclusion about the possibilities of highlighting states' identities as a useful means to introduce immigrants into European political societies is largely delusive. This is because of (a) the universal vocation of contemporary European states, as well as because of (b) the human rights' discourse, which has monopolized moral politics. States obviously differ in the rights they enforce and in how they enforce them, but, since they are all committed to human rights' enforcement, they are reluctant to declare their specificities *as specificities*. Finally, (c) the same European religious – overwhelmingly Christian – traditions, as captured by legal doctrines, have contributed to the fading of the European states' identities, since they have highlighted the *universal* character of human rights.⁵⁸

Nevertheless, the failure in trying to describe a state's identity something specific, without relying heavily on universal human rights is not necessarily a *failure in itself*. It can derive from different factors, and lead to significant conclusions.

The first plausible reason is that traditions are conceptually integrated with the fundamental rights and liberties they embed and culturally express. They are *as universal as human rights*, since they express how a country understands human rights and believes human rights should be enforced. This means that universal human rights aren't necessarily opposed to particular traditions and identities: both can have a universal vocation.⁵⁹ Identities surely have a particular origin, but can have a universal vocation.⁶⁰

The second plausible reason that could explain the failure to describe a national identity in legal terms might derive from the simple fact that identity cannot be defined through law. It can be *described*, but not *prescribed*. A tradition can be enforced and transformed into law, but its distinctive feature lies outside and before the law: it lies in the society that has shaped that collective identity.

Joseph Weiler, while writing about the Christian identity of modern Europe, famously paralleled the European integration's path with the Catholic doctrine of *truth as something that can be proposed, but not imposed*: according to Weiler, both Catholicism and European Union have *proposed* rather than imposed their values and beliefs.⁶¹ If Weiler is right, a country's attitude towards the preservation of the national identity through the generations – which would amount to a tradition – would be better described in terms of a collective proposal that grows through generations and can

58 See Alasdair MacIntyre's criticism of Maritain attempt to use Thomas Aquinas's categories in order to frame the Universal Declaration of Human Rights: *Enciclopedia, Genealogia, Tradizione. Tre versioni rivali di ricerca morale*, Editrice Massimo, Milano, 1993, 120.

59 See Stanley Hauerwas, *Augustinian Thought on the State and Patriotism*, 4 *Oasis* [on-line] 2006, on-line since 14 May 200 (visited June 20th 2012): "The Christian word for universal is catholic".

60 Jeremy Waldron, *Valori particolari e moralità critica*, Alessandro Ferrara (ed.), *Liberalisti e comunitaristi*, Editori Riuniti, Roma 1992, 132.

61 Joseph H.H. Weiler, *A Christian Europe? A European Christianity: Rules of Commitment*, 6 *European View* 2007, 146.

be embraced freely by newcomers as well as by native-born new generations, rather than in mere legal terms.⁶²

This reading implies that traditions nurture the quest for universal rights. Human rights protection as well as human rights progress is therefore strictly related to traditions. Traditions have shaped human rights and still preserve their character of proposal, which is made by a collective body to individuals as well as to collectivities. Alasdair MacIntyre has maintained that “To be outside all traditions is to be a stranger to enquiry,”⁶³ and this affirmation can be applied also to human rights enquiry. In other words, the implementations of human rights can’t be severed from the community that makes such efforts. The enquiry would be “tradition-constituted” as well as “tradition-constitutive.”⁶⁴

The third plausible reason for reconsidering the relationship between tradition and law is that traditional customs or cultures don’t stand still is that they evolve.⁶⁵ They are subject to variation, endorsement or opposition throughout the generations.⁶⁶ And when they change for the better, it is not necessarily because they depart from their origin and align themselves to universal standards, but also because they improve the understanding of their own values.⁶⁷

Since traditions change, they cannot be preserved through the law *as traditions*. Tradition can rather be preserved by the people,⁶⁸ which can decide to keep or dismiss practices and customs. Each generation – a concept that includes immigrants who settle in a country indefinitely – is confronted by the same issues, and can decide to give them different solutions.

The universalistic approach and the traditional approach aren’t really alternative ways to conceive a country’s identity. Tradition includes in the debate and in the understanding of a country’s universal aspirations to human rights’ protection, the rationales that back such aspirations, and the ways through which these aspirations are pursued. Moreover, such reading of universalism and tradition recognizes that both rationales and ways of enforcing human rights are affected by the history, the culture and the religion of the people that have been shaping them for centuries. Tradition enriches the debate about the values and the purposes of a nation,⁶⁹ because it considers human rights as but

62 Obviously, this can conflict with Weiler’s theorization of the *constitutional tolerance* as the cultural device that, in his thinking, would have characterized the making of the European Union. The mere making of a proposal expresses the universal vocation of the proposal itself. See Joseph H.H. Weiler, *Federalism and Constitutionalism: Europe’s Sonderweg*, at <http://ftp.infoeuropa.euroid.pt/database/000036001-000037000/000036583.pdf> (visited June 20th, 2012).

63 *Whose Justice?*, 367.

64 *Id.*, 390.

65 Newman, *Lo sviluppo della dottrina cristiana*, il Mulino, Bologna, 1967, 35.

66 See Donald P. Kommers, *Constitutions and National Identity*, 74 *The Review of Politics* 2012, 132.

67 Newman, *Lo sviluppo*, 35.

68 MacIntyre, *Tradizione*, 283.

69 Jaroslav Pelikan, *The Vindication of Tradition*, Yale University Press, NewHaven-London 1984, 84.

one of the several outcomes of national history and creates an intergenerational dialogue on the collective ends and means of a country.⁷⁰

Gilbert Keith Chesterton expressed this concept in terms that are worth to remember, when he depicted the tradition as the “democracy of the dead.” It is useful to quote his passage entirely, simply considering that the opposition between democracy and tradition can be nowadays substituted with the opposition between human rights and tradition:

*I have never been able to understand where people got the idea that democracy [or, in our case, the commitment to human rights] was in some way opposed to tradition. It is obvious that tradition is only democracy extended through time. It is trusting to a consensus of common human voices rather than to some isolated or arbitrary record. The man who quotes some German historian against the tradition of the Catholic Church, for instance, is strictly appealing to aristocracy. He is appealing to the superiority of one expert against the awful authority of a mob. It is quite easy to see why a legend is treated, and ought to be treated, more respectfully than a book of history. The legend is generally made by the majority of people in the village, who are sane. The book is generally written by the one man in the village who is mad [...] If we attach great importance to the opinion of ordinary men in great unanimity when we are dealing with daily matters, there is no reason why we should disregard it when we are dealing with history or fable. Tradition may be defined as an extension of the franchise. Tradition means giving votes to the most obscure of all classes, our ancestors. It is the democracy of the dead. Tradition refuses to submit to the small and arrogant oligarchy of those who merely happen to be walking about. All democrats object to men being disqualified by the accident of birth; tradition objects to their being disqualified by the accident of death. Democracy tells us not to neglect a good man's opinion, even if he is our groom; tradition asks us not to neglect a good man's opinion, even if he is our father. I, at any rate, cannot separate the two ideas of democracy and tradition; it seems evident to me that they are the same idea. We will have the dead at our councils. The ancient Greeks voted by stones; these shall vote by tombstones. It is all quite regular and official, for most tombstones, like most ballot papers, are marked with a cross.*⁷¹

Though wording them in hilarious terms, it seems to me that Chesterton implicitly acknowledges two basic facts. First, Chesterton tells us that tradition lies in the people, not in the law. Tradition is retained by the people, and cannot be enshrined in legal documents without losing its unique character, since its life lies in the transmission of values among generations: this is a highly relevant consideration, given the fact that contemporary scholars reflect about the possibility of making law

70 Jeffrey Stout, *Democracy and Tradition*, Princeton University Press, Princeton-Oxford 2004, 6.

71 Gilbert K. Chesterton, *Orthodoxy*, Moody, Chicago 2009 (1908), 74.

of tradition.⁷² Second, Chesterton believes that people are free to accept or refuse their own tradition.⁷³

In these two considerations lies the traditional element of democracies as well as the democratic element of traditions. The first tells us that democratic debates include previous generations' thinking, cultures and values; the second reminds us that people, including newcomers, don't simply receive human rights, but they also contribute to their conception and reconsideration actively, since traditions interact openly in shaping a common narrative of rights and duties.⁷⁴ Mr. Riccardi was therefore right when he said that it is necessary that immigrants share their lives with natives: this is the best way they can learn their rights and duties, and even improve them.

Conclusively, tradition – and what the states are really looking for when they talk about national identity – can be enforced *as law*; but it cannot be enforced *as tradition*. Tradition *qua* tradition and identity can only be shared within the society. If immigrants need to know how the society they are joining lives, they shouldn't ask the law; they should rather ask the people. And, if a people want immigrants to know how they live, they cannot simply defer this educative role to the law.

Still, a major work appears still to be done. The Universalist language of human rights needs to be reframed, in order to preserve it as well as in order to give a role to particularism and to state identity.

The universalism as portrayed in this paper is doubly delusive: first, it doesn't help in defining state identities; on the contrary, it deprives the debate about state identity of any substantial role. Second, this universalism has become largely tautological: the states maintain that they enforce human rights properly – or, at least, that they know how they should do it. Therefore, no state would agree in being ranked other than #1, in a list of states based on the degree of protection that they accord to human rights or on how much they strive in order to protect them.

Three aspects need to be addressed properly, in order to reshape the debate about states' identity and about its relationship with universal human rights.

First, if human rights' reflection doesn't only derive from traditions and particular identities, but is still nurtured, reframed and reconsidered through the lenses of traditions, then what is universal

72 David J. Bederman, *Custom as a Source of Law*, Cambridge University Press, New York 2010, 45, reflects about custom in the same way.

73 Interestingly, this approach goes along with some contemporary procedural readings of democracy. For instance, Gustavo Zagrebelsky, *Il "crucifige" e la democrazia*, Einaudi, Torino 2007, 115, in saying that democracies request that any decision can be repealed and reconsidered, is expressing an idea that doesn't conflict with this conception of tradition. If tradition is conceived as an endless narrative of a people about their collective ends, it is obviously open to discussion and criticism.

74 Pelikan, 82.

must be found *precisely* in what is particular.⁷⁵ This is the other way around of reading the relationship between Universalism and localism. Universalism is usually expected to include the best of local legal traditions. This expectation is oftentimes criticized because of its partiality,⁷⁶ of its colonialist cultural background,⁷⁷ or of its excessive thinness.⁷⁸ For what we have seen so far, we can conclude that it is the particular that embeds universalism.

Particularism can be said to incorporate and embed universalism, in a double sense: because particular traditions develop standpoints that have a Universalist vocation and claim,⁷⁹ as well as because it is *within* particular societies⁸⁰ that one discovers, learns, practices and protects human rights.⁸¹

Second, the observation that human rights are normally learned, shaped and even *practiced* at a local level leads us back to Chesterton's reflections about traditions, as well as to MacIntyre contribution to the understanding of virtues.⁸² Chesterton is not thinking about *laws* but rather about *customs and daily practices*. Local identities tend to incorporate a rule, as well as the belief that that rule is just, and the enactment of that rule.⁸³ The experience of law at a local level is therefore thicker than the experience of law at a universal, more abstract level: it encompasses not just statute law provisions or case-law judgments, but also not-written and implicit practices that may well lie under the surface of collectivities, but are so fundamental that don't even need to be written or explicitly declared.

The local level bears an understanding of law that is deeper and broader than what one can meet when focusing on a universal level. Therefore, it may take longer and stronger efforts to detect the local understanding of universal human rights: this is why the somehow similar idea of incorporating practices and customs in a cosmopolitanism of human rights⁸⁴ is more demanding than simply focusing on texts and judicial decisions. Nevertheless, such fatigues are more effective and responsive to the quest for a true human rights' Universalism: human rights' enforcement succeeds precisely when human rights are adopted and practiced on a daily basis, at the local level.

75 Francesco Botturi, *The Decline of the Minimum Common Denominator*, Oasis [on-line], 5 | March 2007, (last visit July 27th, 2012); <http://www.oasiscenter.eu/node/2813>

76 See, famously, the criticism of Edward Said of the Westernized readings of Middle East: *Orientalism*, Pantheon Books, New York, 2009.

77 An-Na'im, *Islam and the Secular State*, Harvard University Press, Cambridge (Mass.), 2008.

78 MacIntyre, *Whose Justice?*, 334.

79 Waldron, *Valori particolari e moralità critica*, 132.

80 Michael Walzer, *Geografia della morale. Democrazia, tradizioni e universalismo*, Dedalo, Bari, 1994, 20-21.

81 Mary Ann Glendon, *Traditions in Turmoil*, Sapientia Press, Ave Maria, 2006; David Novak, *Natural Law in Judaism*, Cambridge University Press, Cambridge, 1998, 13.

82 Alasdair MacIntyre, *After Virtue*, Notre Dame Press, Notre Dame, 1984.

83 Newman, *Lo sviluppo*, 44.

84 Waldron, *Cosmopolitan Norms*, 95-97.

Third, since traditions aren't just dive-boards for human rights, but have been and still are the intellectual engines for human rights' reflection and implementation, then the real novelty that the last decades have brought us consists in the close coexistence of different traditions, which compete as well as collaborate in conceiving and protecting human rights in a globalized world, where free market and circulation of people and goods have become so common.⁸⁵ It is the presence of different collective identities, which use different languages, even within Europe, that poses the strongest challenges. But this cannot be simply addressed through the separation between tradition and law; this would detach the law and the legal change from their very engine. On the contrary, it would be good to consider if, on a narrower scale – as the European continent, or within a single state – new traditions have appeared, even through the hybridization of pre-existing traditions.⁸⁶

The implementation of human rights wouldn't derive from an abstraction of historical traditions, but from the very life of local collectivities, which may have come to incorporate new and different perspectives on law, society and life.

Traditions can change, in their results as well as in the elements that compose them.⁸⁷ In this regard, they are not to be confused with conservatism, which normally aims at stabilizing the composition as well as the outcome of intellectual and cultural reflections.⁸⁸ Actually, the “tradition-constituted” understanding of human rights suggests that immigrants and new comers don't simply join a tradition, but rather contribute to its success and its vitality. And that this success is attainable because traditions are more dynamic – and unpredictable – than what we usually believe.⁸⁹ They are so unpredictable that the attempt to lead them to some targeted goals is perceived as fake and a betrayal of the sense of a tradition.⁹⁰ This is why the initiatives that push for a creation of, say, some *European Islam*, even driving the interpretation of Islamic thought towards foreordained conclusions, are largely taken as religious highjacks.⁹¹

After all, (a) the universality as embedded in particularity; (b) the inclusion of customs and practices in human rights' discourse; (c) the rise of new traditions – which make immigrants' and native traditions meet – as new engines of human rights, are three lines of enquiry that contemporary constitutionalism and legal theory can't reasonably turn down.

85 MacIntyre, *Whose Justice?*, 169.

86 Scola, *Una nuova laicità*, Marsilio, Venezia, 2007.

87 MacIntyre, *Whose Justice?*, 327.

88 MacIntyre, *Whose Justice?*, 165.

89 Newman, *Lo sviluppo*, 46-47.

90 See, authoritatively, Abdullahi Ahmed An-Na'im, *Towards an Islamic Reformation*, Syracuse University Press, Syracuse, 1996.

91 See Wasif A. Shadid, Peter S. Van Koningsveld (eds.), *Religious Freedom and the Neutrality of the State: The Position of Islam in The European Union*, Peeters, Leuven-Parigi, 2002.